United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4151

To be argued by: Anna M. Durbin

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4151

REYES TRIAS DELEON,

Petitioner,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW FROM

THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Reyes Frias Deleon petitioned this court to review the decision of the Board of Immigration Appeals denying him relief from an order of deportation. Petitioner contends that Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. §1251(f), exempts him from deportation based on his conviction for immigration fraud. Petitioner further contends that he will be subject to political persecution in the Dominican Republic, and therefore his deportation must be withheld pursuant to §243(h) of the Act, 8 U.S.C. §1253(h). The decision of the Board of Immigration Appeals should be reversed and the deportation order vacated or the case should be remanded.

ARGUMENT

I. §241(f) EXEMPTS MR. FRIAS FROM DEPORTATION

Respondent INS has not denied that Mr. Frias established the necessary elements to bring him within the ambit of §241(f): (1) Mr. Frias is the husband of an American citizen and the father of two American citizen children, (2) Mr. Frias committed fraud at entry encompassed by §212(a)(19), (3) Mr. Frias was otherwise admissible at time of entry. The Service charges that Mr. Frias is nonetheless deportable pursuant to §241(a)(5) solely because of a conviction for that same fraud at entry.

The Service strains to avoid the clear impact of these facts which bring Mr. Frias within the ambit of §241(f) asserting that the mere fact of Mr. Frias's conviction for fraud at entry transforms that fraud into something other than fraud at entry. Mr. Frias committed only one fraud at entry: he tried to rejoin his family by posing as another person, a permanent resident alien. The prosecution and conviction were not based on a separate act or a separate violation of immigration law. The decision to prosecute by the Department of Justice does not change, aggravate or multiply the fact of fraud at entry. Mr. Frias admitted his fraud and he paid for it by serving a sentence of incarceration. He now seeks only to remain with his wife and family and avoid banishment to a country where he fears for his life because of political persecution.

This is not a case in which an alien has been convicted under 18 U.S.C. §1546 of a crime based on any facts other than "fraud at entry," in which event he would not be entitled to exemption from deportation under §241(f). It is simply a semantic exercise for the Government to attempt to blur the fact that petitioner's sole offense was "fraud at entry" by focusing upon a consequence of that fraud.

Respondent's argument that Reid v. INS, 420 U.S. 619 (1975), forecloses Mr. Frias from a §241(f) waiver is incorrect. The Supreme Court in Reid held that an alien charged with a ground of deportability not dependent in any way on excludability for fraud at entry, namely §241(a)(2), was not exempted from deportation by §241(f). In explicit dicta, the Court went on to declare that even in cases where deportation was premised on excludability at the time of entry, §241(f) would apply only to excludability premised on §212(a)(19) or §211(a). Nothing in Reid limits the application of §241(f) to only those cases where the deportation charge is based on §241(a)(1), and the language of §241(f) would not support such a limitation. Section 241(f) by its terms applies to "the provisions" (plural) of "this section" 241. The precise statutory language thus precludes a holding that only §241(a)(1) charges are waivable. The government's attempt to construe §241(f) out of existence is belied by Chief Judge Kaufman's admonition in a recent deportation case, also involving the effect of a conviction, and closely applicable here in determining the effect of the plural "provisions":

> This unambiguous wording is bolstered by /a/ well-established /principle/ of statutory construction which we must apply here. It is settled doctrine that deportation statutes must be construed in favor of the alien.

Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975).

Mr. Frias's case involves a narrow ground for exemption, not presented to the Supreme Court in Reid, nor previously decided by any other court. In contrast to the facts in Reid, supra, Mr. Frias is charged as deportable under §241(a)(5) for a conviction under 18 U.S.C. §1546. That conviction is dependent solely on misrepresentation of a material fact which renders Mr. Frias excludable at time of entry under §212(a)(19). His conviction and thus the deportation charge in this case are entirely dependent on the fraud at entry. See Reid, 420 U.S. at 623.

Respondent's brief cites cases from the Fifth and Ninth Circuits decided subsequent to Reid which hold that aliens charged with deportability under §241(a)(1) as excludable under §212(a)(20) (failure to possess a valid entry document) are not entitled to the waiver provision of §241(f). Castro-Guerrero v. I.N.S., 515 F.2d 615 (5th Cir. 1975); Guel-Perales v. I.N.S., 519 F.2d 1372 (9th Cir. 1975).[1/] These cases are inapplicable here; there is no charge that Mr. Frias is excludable pursuant to §212(a)(20).

1/ Those courts' interpretations of Reid are problematic at best in that they appear to give the I.N.S. power to render §241(f) nugatory. No alien who enters fraudulently will have a valid entry document, and so the Service can charge any alien excludable under §212(a)(19) under §212(a)(20) as well. See Escobar-Ordonez v. I.N.S., 526 F.2d 969 (5th Cir. 1976). Such a result was not intended by Congress nor by the Supreme Court.

In addition the dicta of those cases as to Reid do not control here, for this Circuit's later interpretation of Reid in Pereira-Barreira v. I.N.S., 523 F.2d 503 (2nd Cir. 1975) provides a differing analysis. The Pereira-Barreira court recognized that by not overruling I.N.S. v. Errico, 385 U.S. 214 (1966) Reid preserved the essence of Errico that the I.N.S. could not "charge shop" to avoid §241(f) when §212(a)(19) was clearly available, and no ground of deportability separate from fraud at entry existed. Id., 523 F.2d at 508, n. 5.

Respondent strains to portray Mr. Frias's fraud at entry as too serious to come within the purview of Congress's beneficial waiver. Respondent's brief at pp. 19-21 insinuates that Mr. Frias may even have evaded inspection when he entered with another alien's documents. The Service has never charged Mr. Frias with evasion of inspection, never proved it, nor does Mr. Frias concede it. The Court of Appeals is certainly the wrong forum in which to raise new allegations, since review is statutorily limited to the record before the administrative agency. 8 U.S.C. §1105a(a)(4). More important, this argument of the respondent proves too much. Every alien who commits fraud at entry tends to frustrate the process in the ways discussed in the respondent's brief. Yet Congress in passing §241(f) has declared that in some cases deportation may nonetheless not ensue. Mr. Frias falls squarely within that class.[2/]

2/ Respondent's argument that Mr. Frias's fraud was more serious than Errico's and Scott's because Mr. Frias's act was criminally punishable also fails. Errico and Scott, who the Supreme Court ruled could benefit from §241(f), admitted illegal acts punishable under 18 U.S.C. §1546 when they conceded evasion of the quota laws. They presented applications containing false statements with respect to material facts, see 18 U.S.C. §1546, paragraph 4.

For the reasons above and for the reasons argued in Petitioner's Brief, Mr. Frias is exempted from deportation pursuant to §241(f) of the Act.

II. THE SMITH LETTER

The letter of James E. Smith was not properly in the record before the immigration judge, nor before the Board of Immigration Appeals. Contrary to respondent's assertions at p. 33 of his brief, the letter was never admitted into evidence. (Adm. Red. #12, at 1-a). Only the state department letter was placed in evidence. Mr. Frias was deprived of his opportunity to object to the inclusion of the Smith letter in the record or to its consideration by immigration judge and BIA.

The Service appears to contend that the letter was "reasonable, substantial, and probative evidence" on which to base an order of deportability. 8 U.S.C. §1252(b)(4)(Resp. brief at 34). If this contention were true, Orders to Show Cause would be evidence in deportation cases, since they are signed by District Directors of Immigration.

The footnote at page 35 of the respondent's brief asserts that the prejudicial link between the Smith letter and the Board's concededly erroneous conclusion that Mr. Frias was convicted for claiming to be a citizen is "tenuous" because of another reference to a false claim of citizenship in the record. ADM Rec. 25, the superseded Order to Show Cause, did allege that Mr. Frias posed as a citizen but at a 1972 entry, not the 1968 entry for which he was convicted and to which the Board referred. The Service abandoned this allegation in its superseding Order to Show Cause. It has no weight even if it referred to the 1968 entry; the letter is the basis of the Board's concededly erroneous and prejudicial conclusion.

In seeking to bolster the credibility of this prejudicial, unadmitted letter even at this late stage of the proceeding, the respondent has appended documents to its brief as Appendix A. These documents were never before the immigration judge, nor the Board of Immigration Appeals. The government cannot now submit evidence it could have attempted to introduce earlier, for Congress explicitly limited the scope of review to be "solely upon the administrative record upon which the deportation order is based." 8 U.S.C. §1105a(a)(4). Counsel for petitioner is not, as alleged in respondent's brief at 9, seeking to avoid facts. Petitioner is entitled to have his case decided on the facts in the record, not on documents and allegations added after proceedings are adjourned when there is no opportunity to object to them. 8 U.S.C. §1252(b)(3), (b)(4); regulations and cases cited at p. 27 of petitioner's brief.

CONCLUSION

For Mr. Frias, this case is more than an occasion for technical legal arguments. If he is deported, Mr. Frias will be forcibly separated from his wife and his two young children. Especially for him, "deportation is a drastic measure and ... the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

For all the reasons included in this Reply Brief and in the Brief of Petitioner, the decision of the Board should be reversed or at least remanded. Mr. Frias is exempted from deportation pursuant to §241(f).

He has established his necessity for withholding of political persecution. §243(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Petitioner were mailed to Taggart D. Adams, Assistant United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007, this 17 day of March 1976.

Stephen Wizner
Commissioner of the Superior
Court, State of Connecticut